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SOME LEADING PRINCIPLES OF CHINESE LAW

IT HAS frequently been remarked that of all nations, China approaches most nearly the Jeffersonian ideal in being the least governed. To a greater extent than any other people, the Chinese manage their own affairs. The usages of trade are defined by the various commercial guilds—organizations which have acquired a prestige and influence without parallel in any other country. Commercial disputes are submitted to these bodies and by them are settled promptly, finally, and usually satisfactorily. Matters of currency and exchange are determined by the powerful bankers' guild. Physicians, fortune-tellers, geomancers and even mendicants, have their organizations through which the interests of the individual members are safe-guarded. In addition to this, each family constitutes to a large extent a self governing unit, presided over by the father or eldest son, or, where collateral branches of the same family are affected, by the family council. There are no police to exemplify our definition of law, for, by virtue of the principle of mutual responsibility, every man is to a large extent, his brother's keeper, and external guardianship is unnecessary. Asylums, hospitals, health departments, fire brigades, and the numerous other institutions which the advancing socialism of western countries finds necessary, are wanting. In fact, the government is limited to the exercise of the fewest possible functions consistent with the maintenance of society in its well defined, immemorial routine, and any attempt to extend its activity is viewed with jealousy and distrust.

In all this, practice is in strict accord with theory. The emperor Han Kao Ti, upon his accession in 206 B. C., made what is known as the "Tripartite Bargain with the Elders of the People." In the terse style of the Chinese classics, this "bargain" is summarized as follows: (1) Death for homicide; (2) Compensation and imprisonment for wounds and robbery; (3) all else left to the people.¹ This emperor, a prototype of our own King John, as gracious as was the latter recalcitrant, is revered to this day by the Chinese who delight to style themselves after his dynastic name "the sons of Han."

The "Bargain," moreover, especially the "all else left to the people," affords a key to a better understanding of contemporary problems. It is the explanation of more than one diplomatic *impasse*. Opposition which foreign representatives, eager for treaties, com-

¹ E. H. Parker, in Journal of the North-China Branch of the Royal Asiatic Society, Vol. XL, p. 24.

mercial openings, concessions, railroad and mining privileges, have attributed to the unreasoning obstinacy of native officials can, in many instances, be more correctly ascribed to their fear of encroaching upon the immemorial rights of their subjects and their vivid realization of the consequences of such a course. A Chinese mob in a frenzy of excitement, destroys a great public work. The reason usually assigned is that the structure "disturbs the spirits of the air and water." It is axiomatic, however, that the motive which an oriental may give for any conduct is rarely the true one. The real situation is probably better expressed by saying that the structure represents, to the masses, an intolerable usurpation of power by the government and a corresponding infringement of popular liberties.

These principles of *laissez faire* explain the ease with which foreign dynasties have established their sovereignty in China. In 1260 the great Mongol dynasty of Kublai Khan established itself in Peking and in 1644 the present Manchu dynasty. Both dynasties had the wisdom to leave the constitution and laws much as they found them and in a short time the people had accommodated themselves to the new rulers and were quietly moulding and subduing them to their own customs and institutions. So long as they are permitted to live after the manner of their ancestors and follow their daily pursuits without molestation it is apparently a matter of indifference to the masses who occupies the dragon throne.

Just as King John was said to have merely reaffirmed the ancient liberties of Englishmen, so the "Tripartite Bargain" was not an enunciation of entirely new principles. Long before this emperor's reign Chinese society had become static. Confucius, who lived in the sixth century before Christ, and whose teachings today influence the conduct of a larger number of men than those of any other moralist, declared that he was merely a transmitter of the doctrines handed down from the illustrious past. He, in common with the other great ethical teachers of China, built up his precepts about the family, laying down the duties of members to each other and crowning all with the teachings of filial piety and respect towards elders for which the Chinese are renowned.

The ethical teachers were also the lawgivers. By them the fundamental family idea was projected into the state, which came to be regarded as one great family with the emperor as *parens patriae*. The duties inculcated in the family relations therefore have their counterpart in the obligations of men in the "state family." Chinese law views all conduct with reference to the norm of the ideal state where man's relations as subject, father, husband, brother and

friend approach the standards inculcated by the philosophers. It is only by achieving such an ideal that the government and people can endure, and, in the words of the present Code, "be secured for endless generations in the enjoyment of the happy effects of the great and noble virtues of their illustrious progenitors." It is to this end that laws are established.

The principles of Chinese law have, therefore, come down from an antiquity more remote than have those of any other legal system. The first collection of laws was made about 950 B. C. Three hundred years later the Chinese anticipated the Romans by casting the laws in metal. The next important codification took place during the Han dynasty, about 200 B. C. Nearly every succeeding dynasty has inaugurated its rule by a new codification, but in spite of changes, the basic principles have remained unaltered and are today what they were three thousand years ago.

The present code, known as the "Ta Tsing Leu Lee," or the "General Laws of the Imperial Dynasty of Tsing," was promulgated in 1647, three years after the accession of the present Manchu dynasty. The Manchus, it will be remembered, were then, as compared with the Chinese, a primitive people of nomadic habits of life. They naturally experienced some difficulty in administering the affairs of a people whose civilization was so old and complex as that of the Chinese. The preface to the code refers to this condition:

"When we contemplate the progressive establishment of our dominions in the East, by our royal ancestors and immediate predecessors, we observe that the simplicity of the people originally required but few laws; and that, with the exception of crimes of extraordinary enormity, no punishments were inflicted besides those of the whip and the bamboo.

"Since, however, the Divine Will has been graciously pleased to entrust us with the administration of the Empire of China, a multitude of judicial proceedings arising out of the various dispositions and irregular passions of mankind in a great and populous nation, have successively occupied our attention. Hence we have suffered much inconvenience from the necessity we have almost constantly been under of either increasing or mitigating the sentences of the magistrates."

The provisions of the code have been modified from time to time by imperial decree and judicial construction. A new edition is published every five years giving all these changes together with references to adjudicated cases and ample commentaries and annotations. The law library of the University of Michigan contains a late edi-

tion in the original Chinese. The only English translation is that of Sir George Staunton, which appeared in London in 1810. The work has long been out of print and is today very rare.

From what has been said it will be seen that Chinese law is pre-eminently criminal. Its central idea is punishment and correction. It follows the ethical systems in regarding the family as the unit. Just as the highest duties inculcated by the moralists are those owing to parents and elders, so the strictest obligations of the law attach to these relationships. By analogy the emperor, as *parens patriae*, is entitled to the obedience of his subjects. The Code, therefore, appropriately opens with a description of offences against the sovereign. Rebellion is defined as "an attempt to violate the divine order of things on earth; for as the fruits of the earth are produced in regular succession under the influence of the presiding spirit, so is their distribution among the people regulated by the sovereign, who is the sacred successor to the seat of his ancestors; resisting and conspiring against him is, therefore, an unspeakable outrage, and a disturbance of the peace of the universe."² The penalty is death by the lingering process, and all males related in the first degree to the offender are subject to decapitation.

No less severe is the punishment visited upon parricide. Here too, the ethical basis of the law is manifested in that intent and design are punished. The code provides that "any person convicted of a design to kill his or her father or mother, grandfather or grandmother, whether on the father's or mother's side, * * * shall, whether a blow is or is not struck, suffer decapitation."³

The gradation of duties in the Chinese ethical system finds its counterpart in the laws which make the degree of punishment depend upon the relationship in which the parties stand. In contrast to the terrible punishment visited upon the parricide is that inflicted upon a father who kills a son, which is only 70 blows and banishment for a year and a half. Between these two extremes the punishments vary, depending upon the nearness of the relationship between the parties, and upon whether the crime is committed by the older or by the younger relative. Thus striking and killing a senior related in the first degree is punishable by decapitation; killing a junior relative related in the same degree subjects the offender to one hundred blows and three years banishment.⁴ Again, harboring the design of killing a senior related within four degrees is punishable with one hundred blows and perpetual banishment to a distance of

² The Ta Tsing Leu Lee, translated by Sir George Staunton, London, 1810.

³ Ibid. § cclxxxiv.

⁴ Ibid. § ccxxvii.

2,000 li; if the intended victim is a junior relation the punishment is less severe by two degrees.⁵

This principle of relationship runs through the entire category of crimes, so that an act which subjects one person to punishment may by another be committed with impunity. Abusive language towards a parent is visited with strangulation.⁶ If the object is an elder relation within the fourth degree of consanguinity the penalty is fifty blows, and the punishment increases with the nearness of the relationship.⁷ The elder relations, however, appear to have the right to revile their juniors *ad libitum*.

Numerous provisions manifest the purpose of the law to protect the solidarity of the family. The law makes allowance for the natural disposition of the members to shield each other from the consequences of a crime. Section xxxii of the Code provides:

"All relations in the first and second degree and living under the same roof, maternal grand-parents and their grand-children, fathers and mothers-in-law, sons and daughters-in-law, grandchildren's wives, husband's brothers and brothers' wives, when mutually assisting each other, and concealing the offences, one of another, and moreover, slaves and hired servants assisting their masters and concealing their offences, shall not in any such cases, be punishable for so doing.

"In like manner, though they should inform their relations of the measures adopted for their apprehension, and enable them to conceal themselves, and finally to effect their escape, they shall still be held innocent.

"When relations in the third and fourth degree assist and protect each other from punishment in the manner here described, they shall for such conduct be liable to punishment, but only in a proportion of three degrees less severe than would have been inflicted on strangers under the same circumstances.

"The same offences committed by relations in still more remote degrees of kindred, shall be punished within one degree of the extent of the punishment inflicted in ordinary cases."

The same purpose appears in the enactments regarding larceny. Every member of the family is regarded as having a qualified interest in the property of every other, the interest being greater the nearer the kinship. The law therefore provides that "all persons found guilty of stealing from a relation by blood or by marriage, in

⁵ Ibid. § ccxxxiv.

⁶ Ibid. § cccxxix.

⁷ Ibid. § cccxxviii.

the first degree, shall suffer a punishment five degrees less severe than that which is legally inflicted in ordinary cases of theft in the same amount. In like manner all persons found guilty of stealing from relations in the second degree shall suffer punishment four degrees less severe than that ordinarily inflicted, from relations in the third degree, three degrees less severe,"⁸ and so on.

The correlatives of the provisions just quoted are those making members of the family mutually responsible for each other's conduct. Section xxx provides that "when the parties to an offence are members of one family, the senior and chief member of that family shall alone be punishable; but if he be upwards of eighty years of age, or totally disabled by his infirmities, the punishment shall fall upon the next in succession." By virtue of this principle the burden of criminal responsibility has been known to descend from father to son for generations while a litigation was taking its leisurely way through the courts to the Board of Punishments in Peking, and finally to the Emperor, until at the end the penalty fell upon some person born long after the event. Fortunately, this law is limited to offenses which do not carry with them direct injury to the person or property of an individual, that is, to offences involving injury only to the state and the public. As all illustrating the same principle, murder of three or more persons in one family subjects the wife and children of the offender to perpetual banishment at a distance of 2,000 li;⁹ murder with intent to mutilate the body of the victim for purposes of magic subjects all the inmates of the criminal's house to life exile.¹⁰

The sections quoted sufficiently illustrate the prominence of the family idea. It pervades all the activities of life and characterizes all Chinese thought. A contract binds not only the promisor himself, but, on his default, the members of his family. Even information is regarded as a family possession. The lawyer who has had to deal with Chinese witnesses soon discovers this peculiarity to his chagrin. The eye witness upon whom he has been relying to prove a certain transaction fails to appear on the day of trial. In his stead comes another, to-wit, an elder brother or a cousin; and no amount of explanation suffices to make clear to him why he is not perfectly competent to testify to facts which were witnessed by a member of his own family.

As has been pointed out, the policy of Chinese law leaves a wide scope to individual initiative and activity. It steps in by way of correction only when conduct offends against the five cardinal rela-

⁸ Ibid. § cclxxii.

⁹ Ibid. § cclxxxvii.

¹⁰ Ibid. § cclxxxviii.

tions. This is well illustrated in the laws covering marriage and divorce. The code defines with great exactitude the parties between whom marriage is lawful,¹¹ but no such thing as a license or public ceremony is required. It is left to the individual to make his matrimonial choice according to law and then to celebrate his nuptials in his own way. If he fails, and marries within one of the prohibited degrees, he is subject to punishment. The same attitude is maintained towards divorce. The Code specifies the grounds for such a separation, enumerating besides those recognized by us, such delinquencies as "talkativeness," "envious and suspicious temper," "disregard of the husband's parents." Upon any of these the husband may give his wife a bill of divorce. Should he, however, perchance misjudge his own case, he is subject to a penalty of eighty blows.¹²

For the same reason the Chinese have little, if anything, that corresponds to our civil law. Private transactions, torts, conversions, contracts, come only slightly within the purview of the Code, and then only in so far as they may affect the cardinal relations. When this is the case, they are made the subject of punitive regulations. Thus, the prompt payment of just debts is essential to the life of a well ordered community. The rate of interest is therefore fixed at 3 per centum a month; he who demands more is punishable with forty blows. If the debtor fails to pay, he is subject to ten blows, and to an increase of punishment at the rate of four blows for every month that he delays.¹³

The principles of Chinese law may appear to us illogical, crude, and even barbarous. A new code, based on western models, such as that of Japan, has been much mooted of recent years. It should be borne in mind, however, that these ancient principles today prevail over a larger portion of the human race than those of any other legal system; that under them the people lead lives of contented industry; that crime is exceedingly rare among the Chinese; and that their days have been long in the land of their fathers. Some philologist has remarked that a people's language is most apt in expressing those ideas whose existence among them is most tenuous. The Chinese have no term corresponding to our word "liberty"; it may well be questioned, however, whether they do not enjoy a greater degree of individual freedom than many other nations who vaunt their liberty in a vocabulary more profuse.

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¹¹ Ibid. §§ cvii-cxv inclusive.

¹² Ibid. § cxvi.

¹³ Ibid. § cxlix.